IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

THE DUCO COMPANY, a Mississippi
Corporation, Plaintiff/Counter-Defendant

v. No. 2:98CV168-EMB

INDYMAC, INC., a Delaware
Corporation, Defendant/Counter-Plaintiff

O P I N I O N

The parties in the above entitled breach of contract action brought under 28 U.S.C. §1441 having consented to trial and entry of final judgment by the United States Magistrate Judge under the provisions of 28 U.S.C. §636(c) and Local Rule 72, with any appeal to the Court of Appeals for the Fifth Circuit, the action came on for non-jury trial before the court at Oxford on November 8-9, 1999, Eugene M. Bogen, United States Magistrate Judge, presiding. Plaintiff and defendant were represented by retained counsel.

BACKGROUND

Plaintiff, The Duco Company (Duco), is a Mississippi Corpora-tion which was, until it closed its business, engaged in residential remodeling. Doug Jones is the CEO of Duco; his wife, Sarah Rhodes, is President of the company. Defendant Indymac, Inc. (Indymac), is a Delaware corporation which at the time of the events leading to this lawsuit was engaged in the business of making home improvement loans.

In November 1997, Duco and Indymac entered into an agreement entitled Dealer Purchase Agreement (Exhibits P-1 and D-1). Curiously, the agreement on its face imposes no obligations upon either party. The agreement merely says that Indymac may in its discretion purchase from Duco debt instruments which Duco may in its discretion offer for sale. Nevertheless, the parties treated the agreement as one designating Duco as an agent authorized to procure home improvement loans for Indymac in cases in which Duco had entered into a home remodeling contract with a

homeowner. Depending upon the circumstances, Indymac purchased debt instruments from Duco or made loans directly to homeowners to pay for repairs performed by Duco. Indymac then sold the loans in the secondary market (Deposition of Mike Ebinger, pp. 60-64). Duco quickly became Indymac's largest residential improvement dealer in the southeast.

FACTS UNDERLYING THIS LAWSUIT

In February 1998, Duco entered into an agreement with one Modine Harris, an elderly resident of Water Valley, Mississippi, for repairs to Ms. Harris' residence. In accordance with its usual practice, a salesman from Duco, Curtis White, obtained credit information from Ms. Harris to submit to Indymac for determination as to whether Ms. Harris qualified for financing. Indymac discovered in the course of its credit check of Ms. Harris that she had credit card debt of almost $18,000.00. Since Ms. Harris' credit rating was A-#1 according to Indymac's system, Indymac approved the loan to Ms. Harris of $35,164.50 (Exhibits P-2 and D-6), amortized, despite her advanced age, over a 25 year period. The loan from Indymac to Ms. Harris was secured by a promissory note and deed of trust on the Harris residential property.

The loan transaction was closed at Ms. Harris' residence, with Doug Jones' son-in-law and Ms. Harris' neighbor/advisor in attendance. The loan proceeds were thereafter distributed as follows: checks for the credit card indebtedness were apparently mailed directly to the credit card companies, and a check payable to Duco for the repair work, $17,177.00, was mailed to Ms. Harris, who in turn delivered the check to Duco's salesman.

The repairs to Ms. Harris' residence began, but shortly thereafter Ms. Harris ordered Duco's subcontractor off the premises. Ms. Harris called Indymac's office in Atlanta and informed Scott Williams, Indymac's vice-president, that the loan checks had been stolen by Duco. Scott Williams and Doug Jones, who had learned of Ms. Harris' accusation, each checked with the credit card companies and verified that the checks had been received. In response to Ms. Harris' accusation, Scott Williams dispatched Eason Reams, a business recruiter for Indymac, to Ms. Harris' residence to investigate the matter. Reams concluded that Ms. Harris was competent but was confused about

many things, that her home needed extensive repairs, and that some work on the home had begun. By this time, late April to late May 1997, Ms. Harris had retained a lawyer.

Ms. Harris' accusation apparently caused considerable apprehension on the part of Indymac that its note and deed of trust from Ms. Harris were invalid because of mental infirmity on her part. By letter dated June 15, 1998, Keith Reynolds, Indymac's general counsel, demanded that Duco purchase the Harris loan in full (Exhibit D-2). This demand had previously been made to Doug Jones by Mike Ebinger, Indymac's president. Jones had countered this demand with an offer to purchase that part of the loan made for the repairs, $17,177.00. Ebinger rejected Jones' counter-offer and insisted that Duco purchase the entire loan. Jones claims that he asked Ebinger whether Indymac would honor loan commitments in Duco's pipeline (i.e., loans worked up and approved by Indymac but not yet funded) if Duco purchased the entire Harris loan, and that Ebinger advised that loans in the pipeline would not be funded. For that reason, Jones claims that he, acting on Duco's behalf, refused to buy the loan.

From June 15, 1998 until June 25, 1998, the lawyers for the parties exchanged letters regarding the dispute. On June 15, 1998, in a letter to Duco, Keith Reynolds demanded that Duco repay the Harris loan in full (Exhibits P-3 and D-2). One June 19, 1998, Duco's lawyer, Jim Amos, forwarded a letter to Keith Reynolds summing up a telephone con-versation they had on June 17, 1998 regarding the matter. Amos' letter summarized Indymac's position as follows:

> 1. Duco had until June 19, 1998 to purchase the Harris loan.
> 2. If Duco complied with the demand to purchase the loan, Indymac would fund the loans in Duco's pipeline.[1]
> 3. If Duco failed to purchase the loan, Indymac would not fund any loans in the pipeline.

The letter from Jim Amos concluded by advising that Duco would not purchase the loan. One June 25, 1998, Keith Reynolds informed Jim Amos in writing that it considered Duco's refusal on June 19 to purchase the Harris loan a material breach of the dealer purchase agreement and terminated all agreements between the parties. This lawsuit ensued.

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[1]This contradicts Jones' claim that Ebinger informed him Indymac would not fund such loans.

After this lawsuit was filed, Indymac reached a settlement with Ms. Harris to avoid litigation regarding the validity of her note and deed of trust. The settlement agreement (Exhibit D-13) provided that Indymac would re-write Ms. Harris' loan for $17,823.00, the amount used to satisfy her credit card debts, and Indymac would employ a contractor to repair the roof of her residence. The roof was repaired at a cost to Indymac of $2,974.60 (Exhibit D-14).

ISSUES

Duco contends in its complaint that Indymac's termination of the Dealer Purchase Agreement was a wrongful breach of the agreement and that Indymac's refusal to fund loans in its pipeline was also a breach of the Dealer Purchase Agreement. Indymac has counterclaimed seeking full repayment of the Harris loan and reimbursement for the expense incurred in repairing the roof of Ms. Harris' residence.

This case was originally filed in the Chancery Court of DeSoto County, Mississippi and thereafter removed to this court. The basis for the court's jurisdiction is the diversity of citizenship of the parties, 28 U.S.C. §1332, and therefore the law of Mississippi applies. Erie Rail-road v. Thompkins, 304 U.S. 64 (1938).

CONCLUSIONS OF LAW

As noted above, the language of the Dealer Purchase Agreement does not impose any obligations upon the parties. Under the terms of that part of the instrument identified as General Agreement, Duco had no obligation to offer for sale any contracts to Indymac, and Indymac had no obligation to purchase contracts from Duco. The express terms of the agreement leave the decisions to offer or accept loan contracts to the discretion of the parties. In addition, the Agreement expressly provides that either party could terminate the Agreement upon giving ten days written notice.

Under Mississippi law, the court is obligated to enforce a contract according to its clear and unambiguous terms. Delta Pride Catfish, Inc. v. Home Insurance Co., 697 So.2d 400 (Miss. 1997). The terms of the Dealer Purchase Agreement regarding termination are absent any ambiguity, and the court is led to the conclusion that Indymac acted within its rights to terminate the agreement pursuant to Keith Reynolds' letter of June 25, 1998 to Jim Amos.

At the time of the termination of the Agreement, which became effective July 5, 1998, ten days after the written notice, there were nine contracts in Duco's pipeline (Exhibit P-45). Indymac had issued loan commitments for the nine contracts, subject to certain stipulations, and Duco, or its alter-ego Duco Holdings, had been given written notice of the loan commitments. According to Doug Jones, all stipulations contained in the loan commitments had been met, and Indymac offered no evidence to the contrary.

Under Mississippi law, the right of a third party to enforce the terms of a contract depends upon whether the contract was entered into for his benefit, or the benefit must directly result from the performance contemplated by the parties. United States v. State Farm Ins., 936 F.2d 206, 209 (5 Cir. 1991), citing Burns v. Washington Savings, 171 So.2d 322, 325 (Miss. 1965). The loan commitments were issued by Indymac to Duco (Exhibits P-9, P-10, P-12, P-13, P-14, P-25, P-26, P-27, P-28). These loan commitments did not materialize out of thin air. Duco solicited the loans for Indymac pursuant to the Dealer Purchase Agreement which served as the foundation of the parties' business arrangement. Under the terms of the loan commitments, Indymac obligated itself to fund a loan to the borrower to pay for repairs to the borrower's home which were to be performed by Duco, subject to stipulations listed in the commitment. Indymac relied upon Duco to see to it that the stipulations were met. These commitments constituted a contract for the mutual benefit of all three parties. Indymac was in the business of making loans; the borrower needed a loan to pay for repairs; Duco was to be paid from the loan for performing the repairs. It therefore follows that Duco is entitled to enforce the loan commitments issued to Duco prior to July 5, 1998.

Duco's expert witness, CPA Danny Williams, testified that Duco's losses could be reasonably estimated by averaging Duco's gross profit percentage for 1996-1998 and applying that percentage to the value of the loans in its pipeline at the time of the termination of the Dealer Purchase Agreement. Williams testified the gross profit percentages were obtained from Duco's tax returns for 1996-1998. According to Williams' formula, Duco suffered a gross profit loss of $37,289.00 as a result of Indymac's failure to fund the loans(Exhibit P-45). In addition, Williams explained that Duco also sought to recover out-of-pocket expenses for each contract and a pro rata share of its advertising budget. However, Williams acknowledged during his testimony that these

items are ordinarily considered routine overhead costs, not lost profit. They are, therefore, not recoverable as an item of lost profit. On its complaint against Indymac, Duco is entitled to recover the demonstrated lost profit of $37,289.00.

As explained above, Indymac disbursed the check to Duco for $17,177.00 for the repairs to Ms. Harris' residence. While Duco contends Ms. Harris' false accusation made it impossible for it to complete the work, nevertheless, the fact remains that Duco was paid for work which was not performed. In addition, Indymac paid a roofing contractor $2,974.60 for re-roofing the Harris residence. This work was listed by Duco on the contracts submitted to Ms. Harris. Accordingly, Indymac is entitled to recover on its counter-claim against Duco the loan proceeds advanced to Duco for the repair work and the amount paid to re-roof Ms. Harris' residence, for a total of $20,151.60.

In summary, Duco is entitled to recover from Indymac the sum of $37,289.00, but Indymac is entitled to an off-set of $20,151.60. Accordingly, a judgment will be entered in this cause in favor of Duco and against Indymac in the amount of $17,137.40.

A separate order in accordance with this opinion shall issue this date.

THIS, the 15th day of November, 1999.

UNITED STATES MAGISTRATE JUDGE

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INDYMAC, INC., a Delaware
Corporation, Defendant/Counter-Plaintiff

FINAL JUDGMENT

In accordance with an Opinion entered this day, it is hereby

ORDERED AND ADJUDGED:

1. That judgment be and is hereby entered in favor of the plaintiff, The Duco Company.

2. That The Duco Company do have and recover of and from the defendant Indymac, Inc. the sum of $17,137.40, together with post judgment interest at the rate of 5.411 percent per annum.

3. Each party shall bear its own costs.

THIS, the 15th day of November, 1999.

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UNITED STATES MAGISTRATE JUDGE